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APR 29 2005

By J. DAVID NAVARRO, CLERK  
DEPUTYIN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADASTATE OF IDAHO, DEPARTMENT OF  
FINANCE, SECURITIES BUREAU,

Plaintiff,

vs.

HOWARD HASKELL HUCKS, and PAUL  
CROXTON DELZELL, d/b/a LANDMARK  
TECHNOLOGY & DEVELOPMENT, INC.,

Defendants.

Case No. CV OC 0404516D

MEMORANDUM DECISION RE:  
MOTION FOR SUMMARY JUDGMENT

## APPEARANCES

For Plaintiff: A. Rene Martin, Deputy Attorney General for the State of Idaho  
For Defendants: Howard Haskell Hucks, Pro se and Paul Croxton Delzell, Pro se

## PROCEEDINGS

The State of Idaho, Department of Finance, Securities Bureau, (the "State") brought this action against the Defendants Howard Haskell Hucks, Paul Croxton Dalzell and Landmark Technology and Development, Inc. alleging that the Defendants violated the Idaho Securities Act. This matter came before the Court on the State's motion for summary judgment.

## STATEMENT OF FACTS

The Defendants Howard Haskell Hucks (Hucks) and Paul Croxton Delzell

(Delzell) are residents of California. Hucks and Delzell conducted business as Landmark Technology & Development, Inc. ("Landmark"). Hucks represents that he is the president and chairman of the board of directors of Landmark. Delzell represents that he is the secretary, compliance officer, and a director of Landmark. Landmark is purportedly engaged in the business of developing and using a new "vortex pump" technology that would extract gold by reprocessing old mine tailings.

In 2001, Hucks and Delzell provided information regarding Landmark's business prospects to two Idaho residents, William B. Schoen and Richard Brooks. Hucks and Delzell represented to Schoen and Brooks that they were seeking funding for Landmark's business venture. Based upon information received from Hucks and Delzell, Schoen and Brooks each tendered \$5,000.00 to Landmark. This was accomplished through a "Landmark Technology & Development, Inc. Revenue Participation Agreement," which was sent to Schoen and Brooks by the Defendants. Schoen and Brooks each signed the Revenue Participation Agreement and returned it to the Defendants. Schoen and Brooks also each sent \$5,000.00 to Hucks. Schoen and Brooks transferred money to Landmark with the promise of receiving the return of their money plus a percentage of Landmark's net revenues. Schoen and Brooks have never received the return of their \$5,000.00, nor any interest or dividend proceeds.

In July 2003, the State of Idaho, Department of Finance began an investigation into this case when the transaction that Hucks and Delzell had engaged in appeared to be securities violations. The State eventually filed this action alleging that Hucks and Delzell illegally offered and sold approximately \$10,000.00 in securities, in the form of investment contracts, to Schoen and Brooks. Count I of the Complaint alleges that the

1 Defendants failed to register securities as required by the Idaho Securities Act, Idaho  
2 Code § 30-1416. Count II alleges that Hucks and Delzell failed to register as broker-  
3 dealer or salesmen to offer for sale securities as required by Idaho Code § 30-1406.  
4 The record reflects that Landmark was never registered with the State of Idaho to offer  
5 or sell securities within the State of Idaho and Hucks and Delzell were never registered  
6 as broker-dealers or salesman to offer securities for sale. Therefore the issue for the  
7 Court is whether the transactions between the Defendants, Schoen and Brooks are  
8 investment contracts and therefore unregistered securities, in violation of Idaho law.

9 The State also alleges that Hucks and Delzell violated the anti-fraud provisions  
10 of the Idaho Securities Act. In the course of the States' investigation of this matter, an  
11 investigator for the Department of Finance, James A. Burns, subpoenaed the bank  
12 records of Defendant Hucks. An analysis of the bank accounts shows that Hucks  
13 received the moneys from Schoen and Brooks and used that money for personal  
14 expenses such as payments to restaurants, gas stations, and grocery stores. However,  
15 there is no evidence of any mining or mining related business that can be reasonably  
16 inferred from a review of the bank statements. The State's Complaint against Hucks  
17 and Delzell includes three counts of securities fraud. Count III of the Complaint alleges  
18 Hucks and Delzell violated Idaho Code § 30-1403(2), by the omission of material facts  
19 in connection with the offer and sale of a security. Count IV alleges another violation of  
20 the anti-fraud provision, Idaho Code § 30-1403(2), by the misrepresentation of material  
21 facts in connection with the offer and sale of a security in Idaho. Count V alleges yet  
22 another violation of the anti-fraud provision under Idaho Code § 30-1403(3), whereby  
23 Hucks and Delzell' acts, practices, and course of business operated as a fraud or deceit  
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upon other persons.

The State seeks relief in the form of: (1) a judgment holding that Hucks and Delzell violated Counts I through V; (2) an injunction prohibiting Hucks and Delzell from committing any further violations of the Securities Act; (3) an injunction prohibiting Hucks and Delzell from offering or selling securities under any exemptions under the Act without the prior written consent of the Director of the Department of Finance; (4) an award of at least \$10,000.00 in the form of a money judgment to the State as restitution for the victims of the Defendants violations of the Securities Act, pursuant to Idaho Code 30-1442(3)(a); (5) civil penalties against Hucks and Delzell awarded to the State in the amount of \$10,000.00 for each violation of the Securities Act, pursuant to Idaho Code § 30-1442(3)(b); and (6) appointment of a receiver or conservator for Hucks and Delzell' assets, pursuant to Idaho Code § 30-1442(3). This matter is set for a court trial to begin May 10, 2005.

Hucks and Delzell do not dispute that they received the sums of money set forth above. The position that Hucks and Delzell assert is that their contact with Schoen and Brooks was for the purpose for obtaining a loan and not the sale of securities. At the pre-trial conference Hucks and Delzell stipulated that the court could enter an order granting an injunction prohibiting both Defendants and Landmark from offering or selling securities under any exemptions under the Act without the prior written consent of the Director of the Department of Finance.

#### LEGAL STANDARD

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is "rendered forthwith if the pleadings, depositions, and admissions on file,

Generally, the trial court is not permitted to weigh the evidence or resolve controverted factual issues when ruling on a motion for summary judgment; rather the party resisting a motion for summary judgment is entitled to a favorable view of conflicting evidence. See *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982). "However, where the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Small v. State*, 132 Idaho 327, 334, 971 P.2d 1151, 1158 Ct. App. 1998); see also *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct. App. 1985) (when the judge will be the trier of fact, he is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts). Therefore, the court is free to draw inferences it deems most probable in conformity with the evidence presented. See *Anderson*, 103 Idaho at 660, 651 P.2d at 925.

## DISCUSSION

Federal law may be used in interpreting the Idaho Securities Act because the Idaho Supreme Court has acknowledged the desirability to maintain uniformity and continuity with the federal securities acts. *Meyers v. Lott*, 133 Idaho 846, 850, 933 P.2d 609, 613 (2000).

1 **1. The Investment in Landmark Constitutes a Security**

2 Idaho Code § 30-1402(12) defines a "security" to include an "investment  
3 contract." See I.C. § 30-1402(12) (2004)<sup>1</sup>. The Department of Finance promulgated  
4 administrative rules (the "Rules") pursuant to the Idaho Securities Act. One of the  
5 Rules defines an "investment contract" as:

6 "Investment Contract" as used in Section 30-1402(12), Idaho Code,  
7 includes, but is not limited to, either or both of the following:

- 8 a. Any investment in a common enterprise with the expectation of  
9 profit to be derived primarily through the managerial efforts of  
10 someone other than the investor. In this Section, a "common  
11 enterprise" means an enterprise in which the fortunes of the  
12 investor are interwoven with and dependent upon the efforts  
13 and successes of those seeking the investment or of a third  
14 party (also known as vertical commonality);  
15 b. Any investment by which an offeree furnishes value to an  
16 offeror and a portion of this value is subjected to the risks of the  
17 enterprise, and the furnishings of said value are induced by the  
18 offeror's promises or representations which give rise to a  
19 reasonable understanding that a valuable benefit of some kind,  
20 over and above said value, will accrue to the offeree as a result  
21 of the operation of the enterprise, and the offeree does not  
22 receive the right to exercise practical and actual control over the  
23 managerial decisions of the enterprise.

24 Rules Pursuant to the Idaho Securities Act, IDAPA 12.01.08.300.03.

25 This Rule parallels the *Howey-Forman* test set forth by the United States  
26 Supreme Court and adopted by the Idaho Supreme Court. *State v. Gertsch*, 137 Idaho  
387, 49 P.3d 392, 398 (2002) (citing *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946)).  
The *Howey-Forman* test for the existence of an investment contract requires: (1) an  
investment of money, (2) a common enterprise, and (3) a reasonable expectation of  
profits to be derived from the entrepreneurial or management efforts of others. *Id.*

Whether a particular set of facts constitutes a security is a question of law. *Id.* at 395.

The first prong of the *Howey-Forman* test requires the investment of money. This simply means parting with money for the purpose and in the reasonable expectation of making a profit. *Id.* at 397. In this case, the State has presented evidence that Schoen and Brooks each invested \$5,000.00 in Landmark with the reasonable expectation of receiving the return of that investment along with a portion of Landmark's profits. The "Landmark Technology & Development, Inc. Revenue Participation Agreement" that was entered into by the parties plainly provides that Schoen and Brooks will receive a percentage of Landmark's profits in return for their investment in Landmark.

The second prong of the *Howey-Forman* test requires the existence of a common enterprise. *Id.* Vertical commonality is the relationship between each individual investor and the promoter and occurs where "the fortunes of the investor are interwoven with and dependent on the efforts and success of those seeking the investment or of third parties." *Id.* This prong is satisfied in this case because the fortunes of Schoen and Brooks were interwoven with and dependent on the efforts and successes of the Landmark promoters Hucks and Delzell.

The third prong of the *Howey-Forman* test requires a reasonable expectation of profits to be derived from the entrepreneurial or management efforts of others. *Id.* at 398. This element is satisfied in this case because Schoen and Brooks reasonably expected profits that were to come from Landmark's success. Schoen and Brooks

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<sup>1</sup> The Idaho Securities Act was superseded by the new "Uniform Securities Act" effective September 1, 2004. This action is governed by the Idaho Securities Act because the acts occurred prior to the effective date of the new act.

1 were not afforded the right to exercise any control over the decisions involving  
2 Landmark's activities. They were not afforded the opportunity to participate in  
3 Landmark's activities in any meaningful way. Rather the profits would come from the  
4 efforts of Hucks, Delzell, and other third parties.

5 The Court will find that these facts meet the definition of a security under Idaho  
6 Code, the administrative rules, and the *Howey-Forman* test. A review of the Revenue  
7 Participation Agreement leaves no doubt that Schoen and Brooks were "investors" in  
8 Landmark. Defendant Delzell, in his memorandum in opposition to this motion,  
9 attempts to argue that the money was only a personal loan; but Delzell does eventually  
10 admit that "[n]one-the-less, the Revenue Participation Agreement Hucks was coerced  
11 into providing does meet the definition of a security." There is no evidence to support  
12 the argument that the money received from Schoen and Brooks was intended as a  
13 personal loan rather than a security. The "Revenue" Participation Agreement clearly  
14 provides that the "investor" will receive an interest in Landmark's net revenue in return  
15 for their investment. Whether a particular set of facts constitutes a security is a  
16 question of law and the Court will find that the Revenue Participation Agreement is  
17 within the definition of an investment contract and thus constitutes a security.  
18 Defendants Hucks and Delzell offered and sold securities to Schoen and Brooks and  
19 must comply with the Idaho Securities Act.  
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## 22 **2. Defendants Violated the Registration Provisions of the Act**

23 "The purpose of securities registration is to protect investors by promoting full  
24 disclosure of information necessary to make informed investment decisions," *State v.*  
25 *Shama Resources Limited Partnership*, 127 Idaho 267, 273, 899 P.2d 977, 983 (1995).  
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A. OFFERING OR SELLING UNREGISTERED SECURITIES

Idaho Code § 30-1416 provides:

It is unlawful for any person to sell or to offer to sell any security in this state, except securities exempt under section 30-1434, Idaho Code, or except securities sold in transactions exempt under section 30-1435, Idaho Code, unless such security is registered by notification, coordination or qualification under this chapter or is a federal covered security.

Idaho Code § 30-1402(10) defines the terms "sell" to include every contract of sale or contract to sell or dispose of, a security or interest in a security for value. I.C. § 30-1402(10). That section also provides that "[o]ffer' or 'offer to sell' includes every attempt or offer to dispose of, and every solicitation of an offer to buy, a security or interest in a security for value." *Id.* Therefore any person who engages in the solicitation of an offer to buy falls within the statute. See *Pinter v. Dahl*, 486 U.S. 622 (1988).

When defining a "seller" of securities under the Idaho Securities Act, the Idaho Supreme Court adopted the "financial benefit test" that was applied by the U.S. Supreme Court in *Pinter v. Dahl*, 486 U.S. 622 (1988), interpreting the Federal Securities Act. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). The financial benefit test defines a seller of securities as one who is motivated by pecuniary gain. *Id.* at 850. This definition extends to "the person who solicits the purchase, motivated at least in part by desire to serve his own financial interests or those of the securities owner." *Id.*

The Court will find that Both Hucks and Delzell violated I.C. 30-1416 by offering and selling unregistered securities to Schoen and Brooks. Hucks telephoned both Schoen and Brooks about the Landmark's project. He gave details to each about the

1 project. He solicited Schoen and Brooks to enter into the Revenue Participation  
2 Agreement and he was motivated by a desire to serve his own financial interest. That  
3 desire was fulfilled when Hucks received the investment moneys from Schoen and  
4 Brooks. Delzell also had continuous contact with Schoen and Brooks. Delzell admits in  
5 his affidavit submitted to the Court that he solicited funding for Landmark's project and  
6 he received a finders fee in return. The Court will find that Delzell was actively engaged  
7 in the solicitation of the investment from Schoen and Brooks. Delzell prepared written  
8 information about the project that he sent to Schoen and Brooks. Delzell had numerous  
9 other contacts with Schoen and Brooks. Delzell received \$1,000.00 from the funds  
10 invested by Schoen and was therefore financially motivated in offering and selling the  
11 securities. The Court will find that Defendants did sell and offer to sell securities to  
12 Schoen and Brooks. There is no dispute that these securities sold by Defendants were  
13 not registered as required by the Act. Accordingly, the Court will find that the State is  
14 entitled to judgment as a matter of law that Defendants Hucks and Delzell violated the  
15 registration requirement of the Idaho Securities Act pursuant to Idaho Code § 30-1416.

17 Delzell argues that the securities were exempt from the registration requirement  
18 under I.C. § 30-1435. However once the State, as the moving party, meets its burden  
19 to establish that Hucks and Delzell violated the Idaho Securities Act, then the person  
20 claiming the exemption has the burden of proving that affirmative defense. See I.C.  
21 §30-1456; *State v. Shama Resources Limited Partnership*, 127 Idaho 267, 273, 899  
22 P.2d 977, 983 (1995). The exemptions from the registration provisions of the securities  
23 acts are construed narrowly. See *SEC v. Murphy*, 626 F.2d 633 (9<sup>th</sup> Cir. 1980). The  
24 Court will find that Delzell failed to provide factual and legal support for the argument  
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1 that the securities were exempt from registration requirements. Delzell supports his  
2 argument with no more than the assertion that "my reading of the Idaho Securities  
3 Code § 30-1435 would seem to grant us an Exemption. . . ." Defendants have failed to  
4 meet their burden of proving the securities are exempt from the registration  
5 requirements.

6 B. UNREGISTERED SALESPERSON OR BROKER-DEALER

7 Idaho Code § 30-1406(1) provides that: "[i]t is unlawful for any person to transact  
8 business in this state as a broker-dealer or salesman unless he is registered under this  
9 chapter, and it is unlawful for any broker-dealer or issuer to employ a salesman unless  
10 the salesman is registered under this chapter." The term "to transact business" is  
11 defined as "to buy or to sell or contract to buy or to sell or dispose of a security or  
12 interest in a security for value." IDAPA 12.01.08.300.01. The definition also includes  
13 every solicitation of any offer to sell a security for value. *Id.*

15 The Court will find that there is no issue of fact as to whether Defendants Hucks  
16 and Delzell sold securities in Landmark to Schoen and Brooks. Both Defendants  
17 actively participated in the selling of the Landmark securities by making representations  
18 and providing information regarding Landmark's project in order to induce Schoen and  
19 Brooks to invest money in Landmark. Delzell admits that he called both Schoen and  
20 Brooks, at Huck's request, to obtain funds for Landmark. Delzell prepared a memo that  
21 he sent to Schoen and Brooks, which outlines the details of the investment process.  
22 Delzell also concedes that he prepared two "Revenue Participation Agreements," at  
23 Huck's request, and sent them to Schoen and Brooks. Hucks also actively participated  
24 in selling the securities through telephone conversations with Schoen and Brooks.  
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Hucks ultimately received the investment monies of Schoen and Brooks. The Court will find that the State is entitled to judgment as a matter of law that Defendants Hucks and Delzell violated I.C. § 30-1406(1) by transacting business in Idaho as a broker-dealer and/or salesman without registering as required by the Idaho Securities Act.

### 3. Defendants Committed Securities Fraud.

To establish fraud under I.C. § 30-1403(2), the State must prove that Hucks and Delzell made untrue statements of material fact or omitted any material facts in connection with the sale, offer, or purchase of any security. See I.C. § 30-1403(2); *Shama Resources Limited Partnership*, 127 Idaho at 272, 899 P.2d at 982. To establish fraud under I.C. § 30-1403(3), the State must show that Hucks and Delzell engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit upon any person. See I.C. § 30-1403(3); *Shama Resources Limited Partnership*, 127 Idaho at 272, 899 P.2d at 982. The State is not required to show the intent to defraud or detrimental reliance. *Id.*

#### A. MISREPRESENTATIONS

The Court will find that Defendants Hucks and Delzell made material representations of fact that constitutes securities fraud. Hucks and Delzell made numerous representations to Schoen and Brooks that the investment monies would be used to further Landmark's mining venture. During telephone conversations Hucks and Delzell assured Schoen and Brooks that their investment monies would be used to get Landmark's project up and running and to obtain necessary software. See e.g. *Affidavit of Richard Brooks*, at 3. The memo that Defendant Delzell sent to Schoen and Brooks provides that the investment monies will be used to "jump start the operation" by finding

1 salesman as required by I.C. § 30-1406(1). Such omissions have been held to  
2 constitute securities fraud. *Shama Resources Limited Partnership*, 127 Idaho at 272,  
3 899 P.2d at 982. Any reasonable investor's decision to invest would be affected by  
4 these facts had they been disclosed. The Court will find that Hucks and Delzell  
5 omissions constitute security fraud.

### 6 CONCLUSION

7 Based upon the foregoing, the Court will GRANT the State's motion for summary  
8 judgment. There is no issue of material fact and the State is entitled to judgment as a  
9 matter that Hucks and Delzell violated the Idaho Securities act as follows:

- 10 1. Defendants offered and sold unregistered securities in violation of I.C. § 30-  
11 1416,
- 12 2. Defendants transacted business in Idaho as securities brokers and salesman  
13 without being registered as required by I.C. § 30-1406(1),
- 14 3. Defendants committed securities fraud in violation of I.C. § 30-1403(2).

15 The Court will find the State is entitled to relief in the form of:

- 16 1. Restitution to be paid by Defendants, jointly and severally, in the amount of  
17 \$5,000.00 to each Schoen and Brooks for a total of \$10,000.00;
  - 18 2. Civil penalties to be paid by Hucks and Delzell in the amount of \$20,000.00  
19 each, for a total of \$40,000.00, for their violations of the Idaho Securities Act  
20 pursuant to I.C. § 30-1442(3)(b);
  - 21 3. The State will be awarded its costs, which includes reasonable attorney's fees  
22 and costs for investigative efforts, upon submitting a memorandum of costs to  
23 the Court, pursuant to I.C. § 30-1442(3)(c).
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1 The State will also submit to the Court a Judgment that sets forth the foregoing.

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3 DATED this 29 day of April 2005.

4   
5 MICHAEL McLAUGHLIN  
6 DISTRICT JUDGE  
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## CERTIFICATE OF MAILING

I hereby certify that on the 29<sup>th</sup> day of April 2005, I mailed (served) a true and correct copy of the within instrument to:

TRIAL COURT ADMINISTRATION  
TWO (2) COPIES

A. RENE MARTIN  
DEPUTY ATTORNEY GENERAL  
PO BOX 83720  
BOISE, ID 83720-0031

HOWARD HASKELL HUCKS  
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PAUL CROXTON DELZELL  
2850 MONTROSE AVENUE #20  
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(ALSO BY FACSIMILE TO: (818) 957-4582)

J. DAVID NAVARRO  
Clerk of the District Court

By: 

Deputy Clerk